Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JUNE TERM, 1994

JAMES H. ANDERS
Petitioner

vs.

WEST MEAD TOWNSHIP ZONING HEARING BOARD and Members, TERRILL AIUPPY, MARK B. ZIMMERMAN, MICHAEL L. JORDAN

&

WEST MEAD TOWNSHIP BOARD OF SUPERVISORS and Members, LORANCE WASSON, DANIEL MINICK, JOSEPH JORDAN
Respondents

PETITION FOR A WRIT OF CERTIORARI THE COMMONWEALTH COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

James H. Anders
(Counsel of Record)
Springs Rd. R.D. 7
Meadville, Pa., 16335
(814) 333-2780

6 PP

QUESTION FOR REVIEW

WAS THE CONCLUSION OF THE WEST MEAD TOWNSHIP ZONING HEARING BOARD THAT BUILDING AREA INCREASES WITH HEIGHT RATIONAL?

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No._____

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WEST MEAD TOWNSHIP BOARD OF SUPERVISORS and Members DANIEL MINICK, LORANCE WASSON, JOSEPH JORDAN

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

Petitioner, James H. Anders, respectfully prays that this Honorable Court issue a writ of certiorari to review the judgement and opinion of the Commonwealth Court of Pennsylvania entered in this proceeding May 27, 1993, with allocatur denied by the Supreme Court on June 1st, 1994.

OPINIONS BELOW

The Supreme Court's Order at No. 353 W.D. Allocatur Docket 1993 refuses to review the Commonwealth Court's Opinion and Judgement at No. 2074 C.D. 1992, Silvestri, Silvestri, Judge, affirming an Order & Opinion of the Court of Common Pleas of Crawford County, Gordon R. Miller, Judge at A.D. No. 1991-751.

JURISDICTIONAL STATEMENT

This Court, pursuant to 28 U.S.C. 1257, is asked to review a decision of the Court of Common Pleas, affirmed by the appellate courts, dismissing his Complaint on preliminary objections finding the Adjudication of the West Mead Township Zoning Hearing Board

and its members immune from suit.

CONSTITUTIONAL PROVISIONS

Constitutional Amendment XIV:

... nor shall any State deprive any person of life, liberty, or property, without due process of law;

STATUTES

42Pa. C.S.A. 8550 Willful Misconduct

In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual malice, actual fraud or willful misconduct, the provisions of Section 8545 (relating to official liability generally), 8546(relating to defense of official immunity, 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply.

WEST MEAD TOWNSHIP ZONING ORDINANCE 1985

Sec. 805- Nonconforming Uses of Structures or of Structures and Premises in Combination.

Section 805.1 - A nonconforming use of part of a building may be extended throughout the building if no exterior structural changes are made and no additional floor area is added to the building, providing such enlargement or extension is permitted as a special exception by the Zoning Hearing Board.

805.2 A nonconforming use of a whole building may be enlarged or extended to occupy additional building area which is greater by 50% than the area occupied at the effective date of adoption of this Ordinance or an amendment thereto, providing such extension or enlargement is permitted by the Zoning Hearing Board as a special exception.

805.3 A nonconforming building may be altered or reconstructed providing such work does not extend the area of the nonconformity.

STATEMENT OF THE CASE

Petitioner, James H. Anders, owns property in West Mead Township where he had constructed a one story residence in 1983 when the area was zoned residential. In 1988, Mr. Anders applied to the zoning officer for a permit to expand his residence by adding one and one half stories, that is to say, one complete story and another occupying one half the floor area of those beneath. The zoning officer denied the application stating, "If you want to add a story and a half, that would be a 150% area increase, and would require a variance." He explained that the area was now zoned General Industrial and that Mr. Anders' residence was a nonconforming use.

Mr. Anders requested a variance before the Zoning Hearing Board in the fall of 1988. The appeal was denied. Anders continued to the Court of Common Pleas arguing that the expansion should be permitted by right as it took up no additional land. The Court denied his appeal as did Commonwealth Court which determined that the vertical expansion increased both floor area as well as building area. The Supreme Court denied review.

In 1990 Petitioner returned to the Zoning Hearing Board for a special exception under Section 805.2 of the Ordinance, which allows the area of a building to expand by up to 50%. Anders argued at the initial meeting that area remained constant despite an increase in height. The Township Solicitor, Mr. Alan Shaddinger, argued that the area of the building expanded with height. The Board asked that legal argument be presented at a second meeting. (App. p. 21 and 22)

At that meeting Anders submitted three

cases in support; he submitted a sample definition of building area from a zoning treatise and submitted the logical argument that if building area increases with height, building area will exceed lot area, an impossibility.

Opposing counsel submitted no case law or zoning law relying in full upon Commonwealth's Opinion. The Board voted unanimously to deny the special exception.

Anders sued the board members in the Court of Common Pleas alleging that it was incompetent to determine that building area increases with height. The Court dismissed the Complaint on preliminary objections finding the facts insufficient to overcome the defendants' immunity. (Appendix p.45).

Commonwealth Court affirmed. (App. p.56) The Supreme Court denied review. (Ap. p.57)

FEDERAL QUESTION RAISED, PASSED ON

The federal question- whether the Board deprived Anders of the use of his property without reason- was raised in the Complaint,

entitled Suit to Recover Damages for the Incompetent Determinations of the West Mead Township Board of Supervisors and Zoning Hearing Board Denying a Lawful Expansion and was negated by the trial court because wilfulness had not been proven. Commonwealth Court affirmed and the Supreme Court refused review.

ARGUMENT

Petitioner argues that when the law is laid out to a board member, he or she must obey the law. Elsmere Park Club Limited Partnership v. Town of Elsmere. Board members asked Anders to submit case law, zoning law, legal argument in support of his contention that building area is always defined on a horizontal plane. Anders cited Robert Anderson's definition from LAW OF ZONING IN PENNSYLVANIA for building area which states:

> Building Area- The total of areas taken on a horizontal plane at the main grade level of the principal building and all

accessory buildings, exclusive of uncovered porches, terraces and steps.

To illustrate the point that area doesn't change with height, petitioner argued that if area increased with height, the Crawford County Courthouse, a three story building occupying its entire lot, would have a building area three times its lot area, an impossibility.

Anders reinforced the point with the case of Jenkintown Towing Service v. Zoning Hearing Board of Upper Mpreland Township, a case wherein a two story building occupies the same area as a one story building. He cited In Re Albert O. Yocum to show that a second story can be brought flush with the first without increasing the building's area; he cited the Appeal of Roland S. Grubb to show that an L shaped building could be enlarged to form a rectangle without increasing the area of the nonconformity.

The Township based its opposition on Commonwealth Court's Opinion of the previous year which stated:

> Appellant attempts to persuade this Court that the addition of one-and-half stories did not extend the area of non-conformity thus obviating the need for a variance3. Although the Ordinance does not define the term "area", this Court must look to Section 805 of the Ordinance (Nonconforming Use of Structures or of Structures and Premises in Combination) for guidance. Section 805.1 refers to additional floor area; and Section 805.2 refers to additional building area. When read as a whole, both floor area and building are are defined in the Ordinance. Hence since the expansion enlarges both the floor area as well as the building area, Appellant required a variance.
>
> (App. p. 14)

Anders told the Board that the Commonwealth Court's Opinion was non sense. The Board however concluded that:

> The term building area as used in the West Mead Township Zoning Ordinance , is not limited or restricted to the area of land occupying the building.
>
> (App. p. 30)

To conclude that building area is not limited to the area of land occupied by the building - given that building area is defined on a horizontal plane- is irrational.

To allow the board members an irrational conclusion, a conclusion which is mathematicaly impossible, is error by the Court of Common Pleas.

CONCLUSION

The Zoning Hearing Board has deprived Petitioner of the use of his property without reason. That the proposed expansion increases the area of the building is without support. Under the law set out by petitioner, including Anderson's definition of building area, common sense argument and case law and without an opposing definition, case or argument propounded by the Township's Solicitor, a reasonable official such as the respondent board members Terrill Aiuppy, Mark B. Zimmerman and Michael L. Jordan is bound to conclude that the upward expansion did not violate Section 805.2 of the Ordinance.

Petitioner asks this Court to remand for trial.

Respectfully submitted,
James H. Anders

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APPENDIX

1. OPINION & ORDER, Commonwealth Court of Pennsylvania, No. 749 C.D. 1989, September 20, 1989 — 11-18

2. DECISION, Zoning Hearing Board West Mead Township, No. 88-28, January 2, 1991 — 19-33

3. MEMORANDUM & ORDER, Court of Common Pleas, Crawford County Pennsylvania, A.D. 1991-751, August 28, 1992 — 34-46

4. MEMORANDUM & ORDER, Commonwealth Court of Pennsylvania No. 2074 C.D. 1992, May 27, 1993 — 47-56

5. ORDER, Supreme Court of Pennsylvania, No. 0353 W.D. Allocatur Docket 1993 — 57

JAMES H. ANDERS Appellant	:	IN THE COMMON WEALTH COURT
v.	:	OF PENNSYLVAVIA
WEST MEAD TOWNSHIP ZONING HEARING BOARD, Appellee	:	No. 749C.D. 1989

BEFORE:

HONORABLE JAMES CRUMLISH, JR., president Judge
HONORABLE MADALINE PALLADINO, Judge (P.)
HONORABLE DORIS A. SMITH, Judge

SUBMITTED ON BRIEFS: June 30, 1989

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH

Filed September 20, 1989

James H. Anders, (Appellant) appeals the decision of the Court of Common Pleas of Crawford County dismissing his appeal and upholding the decision of the Zoning Board of West Mead Township (Board) which denied Appellant's request for a variance. The trial court's decision is affirmed.

Appellant owns a one-story single family residential structure which he constructed in 1984 when the area was zoned residential. In 1985 the subject area was rezoned to general industrial thereby rendering Appellant's structure a nonconforming use. In April of 1988, Appellant began construction of a one- and one- half story addition to use the struc ture as two seperate residential units. Appellant applied for a building permit on July 5, 1988 which was denied by the Township Zoning Officer (Officer) by letter dated July 19

1988. The letter contained specific information regarding Appellant's options pursuant to the West Mead Township Zoning Ordinance (Ordinance). Accordingly, Appellant applied for a variance which was denied by the Board which concluded that Appellant failed to meet his burden of proof as set forth in Section 1005.3 of the Ordinance.[1] Appellant then filed an appeal with the trial court which concluded that the Board did not commit an abuse of discretion or an error of law in denying Appellant's request for a variance.

Appellant argues that the expansion upwards of his nonconforming building does not extend the area of the nonconformity and therefore he is permitted by right to expand pursuant to Section 805.3 of the Ordinance[2]. Additionally, Anders contends that his expansion would not adversely affect the health, welfare and safety of the general public.

Appellant attempts to persuade this Couty that the addition of one-and one-half stories

did not extend the area of nonconformity thus obviating any need for a variance.[3] Although the Ordinance does not define the term "area" this Court must look to section 805 of the Ordinance (Nonconforming Use of Structures or of Structures and Premises in Combination) for guidance. Section 805.1 refers to additional floor area; and section 805.2 refers to additional building area. When read as a whole, both floor and building area are defined in the Ordinance. Hence, since the expansion enlarges both the floor area as well as the building area, Appellant required a variance. This Court therefore perceives the issue to be whether Appellant established his entitlement to a variance.[4]

The Supreme Court has set forth the requirements for seeking a variance in Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 555-556, 462 A.2d 637, 640 (1983):

The party seeking the variance bears the burden of proving that (1) unnecessary hardship will result if the variance is denied, and (2) the proposed use will not be contrary to the public interest. The hardship must be shown to be unique or peculiar to the property as distinguished from a hardship arising from the impact of zoning regulations on an entire district. Moreover, mere evidence that the zoned use is less financially rewarding than the proposed use is insufficient to justify a variance. (Citations omitted)

Appellant failed to establish any unnessary hardship. Appellant's contention before the Board was that the enlargement or expansion would alleviate the feeling of isolation experienced by occupants of the premises as no residential community existed in the immediate area and that there was no view of the road from the property which was situated at the bottom of an incline leading to Liberty Street. Appellant further testified that unless his variance was granted, he would suffer an undue hardship as the existing use was not conducive to residential use and could be reasonably used as such. Board Findings of Fact Nos. 13-17.

This Court has consistently held that financial hardship alone is not sufficient reason for granting a variance. See Immordino v. Morrisville Zoning Hearing Board, 65 Pa. Commonwealth Ct. 79, 441 A.2d 818 (1982). Furthermore, when an applicant begins construction and then requests a variance, the applicant is responsible for this unnecessarily self-inflicted hardship due to commencement of construction prior to approval Id. at 85, 441 at 821.

The record contains no evidence that Appellant could not have continued using his property as a single family residence, that he could not use his property for general industrial use. Accordingly, this Court concludes that Appellant failed to establish the necessary requirements for seeking a variance. Since Appellant failed to establish unnecessary hardship, there is no need to determine whether the expansion would affect the health safety or welfare of the public.

The decision of the trial court is hereby affirmed.

DORIS A. SMITH, JUDGE

---

[1]Section 1005.3 requires an applicant for a variance to establish that the provisions of the zoning ordinance strictly applied will inflict unnecessary hardship by depriving applicant of a reasonable use of his property and that the proposed use of his property will not be adverse to the public interests.

[2]Section 805.3 provides that "a nonconforming building may be altered or reconstructed providing such work does not extend the area of the nonconformity."

[3]Appellant relied upon dicta in Jenkintown Towing Service v. Zoning Hearing Board of Upper Moreland Township, 67 Pa. Commonwealth Ct. 183, 446 A.2d 716 (1982) in support of this argument. Jenkintown is inapposite since the term building area was defined in the applicable ordinance.

[4]Where the trial court does not take additional evidence, this Court's scope of review is limited to a determination of whether the Board committed a manifest abuse of discretion or an error of law in not granting the variance. Searles v. Zoning Hearing Board of the City of Easton, 118 Pa. Commonwealth Ct. 453, 545 A.2d 476 (1988).

JAMES H. ANDERS,
Appellant

v.

WEST MEAD TOWNSHIP
ZONING HEARING BOARD,
Appellee

: IN THE COMMONWEALTH COURT OF PENNSYLVANIA

: No. 749 C.D. 1989

ORDER

AND NOW this 20th day of September, 1989 the decision of the Court of Common Pleas of Crawford County is affirmed.

DORIS A. SMITH, Judge

West Mead Township Zoning Hearing Board

In Re: Zoning Application Case No. 88-28

Application of James H.Anders for Special Exception

Whereas, James H. Anders, of Springs Road R.D. #7, Meadville Pennsylvania, was denied a building permit by William B. Moore, Zoning Officer of West Mead Township, the application concerned an addition to an existing residential building on property owned by Mr, Anders and located along Liberty Street Extension, being 105 Crawford Street, West Mead Township, Crawford County, Pennsylvania. and

Whereas, the said James H. Anders appealed to the Zoning Hearing Board of West Mead Township and made application for a Special Exception; and

Whereas, on the said application for a Special Exception, said James H. Anders stated, "I propose to finish the addition be

gun in May of 1988 which consists of a two story vertical addition, making the whole into a duplex. The second apartment will have two entrances, one on each floor. The top floor would be connected to Liberty st. Extension via bridge, the middle floor to the ground floor with steps. Parking for the addition would be on Liberty Street Extension. The septic field is adequate according to DER standards. I desire this addition to end the isolation of the site. The addition would make the house visible to the community The only nonconformity of my property is one of use" and

whereas, West Mead Township Zoning Hearing Board did cause public notice to be published in the Meadville Tribune, a newspaper of general circulation in and about West Mead Township, that the West Mead Township Zoning Hearing Board would hold a hearing on Wednesday, October 31, 1990, beginning at 8:00 p.m. at the West Mead Township Community Center Building, located on Morgan Village Road Meadville, Pennsylvania, to consider the Zoning Appeal of James H. Anders with respect to property located at 105 Crawford Street, adjacen t to Liberty Street Extension, in West Mead Township, and for the consideration of

said appeal; and

whereas, proper notice of said appeal was also given surrounding property owners in accordance with the West Mead Township Zoning Ordinance; and

Whereas, said public hearing was duly held before the West Mead Township Zoning Hearing Board on October 31, 1990 at which time said James H. Anders presented testimony on behalf of his appeal. The Board also heard testimony from two township residents in opposition of said appeal, as well as argument on behalf of the Township by Township Solicitor Alan R. Shaddinger indicating the opposition of West Mead Township to said appeal; and

Whereas, said Hearing was adjourned and the Board gave Alan R. Shaddinger, on behalf of the Township and Mr. Anders an opportunity to file briefs and/or legal arguments before the Zoning Hearing Board in support of the respective positions; and

Whereas, legal arguments were submitted by James H. Anders, on his behalf, on Nov. 5, 1990. On Nov. 26, 1990 a memorandum of law was filed by Attorney Alan R. Shaddinger; and

Whereas legal notice was further given of the second hearing on this matter, to be held on Wednesday, December 12, 1990 at 7:00 p.m. at the West Mead Township Community Center Building, Morgan Village Road, Meadville,Pa. This meeting being a continuation of the hear ing commenced October 31, 1990. This Notice appeared in the Meadville Tribune, and in addition written notice of same was given to James H.anders by the West Mead Town ship Secretary. and

Whereas the continued hearing was held on Dec. 12, 1990, at which time legal argument was presented by the applicant, James H. Anders. Also argument was heard in opposition to Mr. Anders application by Attorney Alan R.Shaddinger on behalf of West Mead Township; and

Whereas, after hearing all of the testimony and argument in regard to this application for a Special Exception, the West Mead Township Zoning Hearing Board determined that James H. Anders should not be granted a Special Exception and the action of the Zoning Officer in denying the building permit should be affirmed; and

Whereas, said James H. Anders was advised that he will be furnished a copy of the Findings of Fact and Conclusions of Law, and that said Findings of Fact and Conclusions of Law would be placed of record at the next meeting of the Zoning Hearing Board to be held December 27, 1990; and

Whereas, at the meeting of December 27, 1990 a postponement of the reading of said Findings of Fact and Conclusions of Law was made to a meeting to be held January 2, 1991 at 7:00 p.m. at the West Mead Township Community Center Building, Morgan Village Road, Meadville, Pennsylvania,

Now, therefore, the West Mead Township Zoning Hearing Board on this 2nd day of January makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. James H. Anders owns certain property located along Liberty Street Extension, known as 105 Crawford Street, Meadville, West Mead Township, Crawford County, Pennsylvania.

2. On or about April 1988, James H. Anders began construction of an addition to a then existing one story residential structure intending to make said building into a two and a half story structure allowing for use as two separate residential units.

3. After nearly completing said one and one-half vertical addition to the existing structure, Mr. Anders made application for a building permit which was denied by the West Mead Township Zoning Officer because this expansion of the non-conforming residential use was not permitted by the West Mead Township

Zoning Ordinance. He then appealed the decision of the Zoning Officer to the Zoning Hearing Board on November 30, 1988. The Zoning Hearing Board affirmed the decision of the Zoning Officer on December 5, 1988.

4. James H. Anders appealed the decision of the Zoning Hearing Board, on the basis that a variance should be granted from the terms of said Ordinance to allow his expansion. Ultimately the case was appealed to the Courts of Common Pleas of Crawford County, the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania. All of said appeals resulted in affirming the decision of the Zoning Hearing Board.

5. James H. Anders on September 26, 1990 filed an appeal from the Zoning Officer's denial of a building permit to the West Mead Township Zoning Hearing Board. The said appeal was filed on the basis of an application for a Special Exception. The following statement was part of said appeal of Mr. And-

ers, :
I propose to finish the addition begun in May of 1988 which consists of a two story vertical addition, making the whole into a duplex. The second apartment will have two entrances, one on each floor. The top floor would be connected to Liberty Street Extension via bridge, the middle floor to the ground floor with steps. Parking for the addition would be on Liberty Street Extension. The septic field is adequate according to DER standards, I desire this addition to end the isolation of the site. The addition would make the house visible to the community. The only nonconformity of my property is one of use."

5. This request for a Special Exception concerns the interpretation of Section 805.2 of the West Mead Township Zoning Ordinance which reads as follows (This section was amended on November 1989 as a result of James H. Anders' proceeding for a curative amendment.)

"A nonconforming use of a whole building may be enlarged or extended to occupy additional building area up to 50% of the area occupied on the effective date of this Ordinance or an amendment thereto, providing that such enlargement or extension is permitted as a special exception by the Zoning Hearing Board."

7. The testimony at the Zoning Hearing of October 31, 1990 basically established that Mr. Anders was not proposing to do anything

different from what was proposed in his first appeal to the Zoning Hearing Board in 1988. He was again seeking a building permit for the same one and one-half stories he had built on top of his one story residential structure, this structure was a nonconforming use in a General Industrial District.

8. It is the Board's understanding that Mr. Anders' argument, and this special Exception application, does not differ substantially from his argument in his first appeal for a variance. It is his position that the one and one-half storyaddition takes up no new "building area" and therefore he automatically qualifies for a special exception unless the Board or any protestors can prove that his structure would harm the community. It is also Mr.Anders' position that the "building area" is always the length of a building times its width <u>at grade</u> (emphasis supplied). He also argues that "building area" cannot be a function of height.

9. The position of West Mead Township, in opposition to the application for a Special Exception was two fold: (a) The term "building area" in Section 805.2 does not mean and is not limited to the area of land covered by the building. That the plain meaning of the language of the ordinance, requires that the term "building area" includes the whole area of the whole building and not just its floor area or the area of land occupied by the building. (b) The Township makes one other argument that Mr. Anders' appeal is barred by the application of the Doctrine of res judicata. This argument is based upon the fact that assuming argumendo that a variance was initially applied for two years earlier, his application now for a special exception must be denied, since the relief sought is identical. West Mead also argues that the parties and their interest are identical. West Mead argues that the ordinance governing this issue

remains essentially unchanged.

Conclusions of Law

1. The property of James H. Anders, which is the subject of this appeal, was an existing nonconforming one story residential structure located in a General Industrial Zoning District (GI) in West Mead Township, Crawford County, Pennsylvania.

2. Residential uses are not permitted uses in the GI district.

3. Expansion or enlargement of this existing nonconforming use is subject to the limitations set forth in Section 805.2. Such an enlargement or extension as requested is permitted by Special Exception of the Zoning Hearing Board.

4. Mr. Anders has throughout his initial appeal to the Zoning Hearing Board in 1988 and in the legal appeals that followed, and throughout this appeal process, has argued that the term "bilding area" equals length times width at grade and that the building

area is always the length of a building times its width at grade.

5. The Board concludes that Mr. Anders' definition of "building area" is not consistent with the intent and meaning of Section 805.2 of the West Mead Township Zoning Ordinance. The term "building area" as used in the West Mead Township Zoning Ordinance, is not limited or restricted to the area of land occupying the building. To conclude otherwise would lead to results inconsistent with the intent of the wording in said section 805.2.

6. In interpreting Section 805.2 of the West Mead Township Zoning Ordinance the Board takes cognizance of the opinion of the Commonwealth Court of Pennsylvania, filed on Mr. Anders' first zoning appeal. This opinion was issued on September 20, 1989. Mr. Anders attempted to persuade the Commonwealth Court, inter alia, that the addition of a one and one-half stories did not extend the area of nonconformity. The Commonwealth Court, in

essence, rejected that argument and indicated that the expansion of the appellant (Anders) enlarged both the floor area, as well as the building area. This decision of the Zoning Hearing Board would be consistent with the opinion of the Commonwealth Court of Pa.

7. The testimony of Mr. Anders and his legal argument contain no new information that differs from that given at his prior appeal in 1988, Although that prior appeal dealt in essence with a variance request, and this appeal deals with a special exception, he was fully heard on both appeals concerning his argument that he was not enlarging the "building area" greater than 50% and in fact his argument is that he is not enlarging the "building area" to any degree. There fore, the argument of West Mead Township that this current appeal is barred by the application of Doctrine of res judicata would have merit. However, this Board has decided not to base its decision on this

appeal on this procedural issue, but rather has chosen to give Mr. Anders an "additional day in Court" to again argue the merits of his appeal.

8. Accordingly, James H. Anders has not established that he is entitled to a Special Exception under the Board's interpretation of Section 805.2 or any other section of the Zoning Ordinance of West Mead Township.

ORDER

AND NOW, this 2nd day of January 1991, in consideration of the above Findings of Fact and Conclusions of Law, the West Mead Township Zoning Hearing Board does hereby the appeal of James H. Anders and denies his request for a Special Exception under the provisions of the West Mead Township Zoning Ordinance. We upholding the action of the Zoning Officer in his denial of a building permit for the purpose of adding a story and a half to an existing building on property owned by James H. Anders with an address of 105 Craw-

IN THE COURT OF COMMON PLEAS, CRAWFORD COUNTY
PENNSYLVANIA

CIVIL ACTION - LAW

JAMES H. ANDERS, :

: A.D. No. 1990-1191

VS. :

ZONING HEARING BOARD, OF
WEST MEAD TOWNSHIP,

James H. Anders, pro se

Alan R. Shaddinger, Esquire, for West Mead Township

Charles J. Swick, Esquire, for the Zoning Hearing Board of West Mead Township

MEMORANDUM

Robert L. Walker, S.J.

James H. Anders (Appellant) appeals the decision of the West Mead Township Zoning Board (Board) which denied Appellant's request for a special exception.

Appellant owns a one-story single family residential structure which he constructed in 1984 when the area was zoned residential. In 1985 the subject area was rezoned to general

ford Street, Meadville, West Mead Township, Crawford County, Pennsylvania.

West Mead Township Zoning
Hearing Board

BY: _____
Terry Auippy, Chairman

BY: _____
Mark B. Zimmerman, member

BY: _____
Michael L. Jordan, member

IN THE COURT OF COMMON PLEAS OF

CRAWFORD COUNTY, PENNSYLVANIA

CIVIL ACTION

JAMES H. ANDERS, Plaintiff	:	
vs.	:	
ZONING HEARING BOARD OF WEST MEAD TOWNSHIP & WEST MEAD TOWNSHIP BOARD OF SUPERVISORS ET AL., Defendants	:	A.D. 1991-751
vs.	:	
WEST MEAD TOWNSHIP BOARD OF SUPERVISORS, DANIEL MINICK, LORANCE WASSON, JOSEPH JORDAN, Members Defendants	:	

James H. Anders, pro se

Alan R. Shaddinger, Esquire, for all defendants

MEMORANDUM AND ORDER

Gordon R.Miller, P.J.

ISSUE

The basic issue is whether or not the amended complaint filed by the Plaintiff (after we granted defendants' demurrer to the first complaint) properly states a cause of action

against the Zoning Hearing Board and/or West Mead Township for negligence or the individual members of those Boards for negligence, actual fraud, actual malice or willful misconduct. We think not, and once again grant the defendants' demurrer and dismiss the plaintiff's amended complaint bringing this action to a close.

BACKGROUND

" In determining whether to sustain preliminary objections in the nature of a demurrer, all well pleaded facts and all inferences that may be deduced therefrom, but not conclusions of law, must be accepted as true... A demurrer will not be sustained unless the face of the complaint shows that the law will not permit recovery, and any doubts should be resolved against sustaining the demurrer... However any argumentative allegations or expressions of opinion are not accepted as true." Malia v. Monchak, 116 Pa. Cmwth. 484, 543 A.2d 184, 187; Firing v. Kephart, 466 Pa, 560, 353 A.2d 833 (1976).

In our Memorandum and Order filed March 13, 1992 and in the defendants' brief that was filed in support of their latest preliminary objections the procedural history and much of the background involving these

parties has been set forth. We will not repeat that here.

We will give the plaintiff a great deal of latitude and accept as true all well pleaded portions of the plaintiff's original complaint, amendment of complaint to include fraud as well as incompetence and the amended complaint to overcome dismissal, filed on August 5, 1991, March 19, 1992 and March 27, 1992, respectively. When we read these three documents together it appears that the plaintiff is alleging that in October of 1990 he applied to the Zoning Board for special exceptions to finish construction to an upper story addition to his residence that he began in April of 1988. He explained that building on top of the existing building did not expand the building area and he cited a Pennsylvania zoning treatise in support of that position.

He alleges that the Board took the matter under advisement. He submitted three cases

in support of his arguments and the Township Solicitor submitted no cases. Nonetheless the Zoning Hearing Board denied his request for a special exception.

He then applied to the West Mead Township Board of Supervisors to add a definition for building area so the building area would simply be the outside dimensions of the building without regard to the height of the structure. The Board of Supervisors denied that request for a curative amendment.

The plaintiff claims that these determinations were "incompetent", "unconscionable" and lack sense and reason (original complaint). In his "Amendment to Complaint to include Fraud as well as Incompetence" he alleges that a letter from the Crawford County Planning Commission recommending the zoning ordinance be changed to include a definition of building area was not included in the record that came to this Court from the Zoning Hearing Board or the Township.

Finally, in his "Amended Complaint to Overcome Dismissal" filed on March 27, 1992, he claims that the Zoning Hearing Board went against all of the case law that he had cited and went against common sense. Thus he concludes that its unanimous decision constituted "wilful misconduct" and "malice".

In short, the plaintiff alleges in these three "pleadings" that the Zoning Hearing Board and the Township Supervisors disagreed with him as to whether his upward addition violated the zoning ordinance and whether the ordinance should be amended to include a better definition of building area. Because he felt his case was so compelling he concludes that they acted with malice and engaged in wilful misconduct.

DISCUSSION

The defendants actually filed preliminary objections on many grounds. They claim that the Court lacks personal jurisdiction over the defendants because they have not been

properly served. We agree with that (Pa. R. C.P. 400(a)) and if that were the only defect we would simply direct that proper service be made.

The defendants claim that the complaint and the amended complaints should be stricken for failing to set forth claims in separate counts. We agree with that (Pa.R.C.P. 1020 (a)).

The defendants claim that the complaint and amended complaints fail to set forth the material facts in a concise manner. We agree with that. (Pa.R.C.P. 1017(a) and 1019(a)). For these latter reasons we would normally strike the complaint and give the plaintiff time to plead once again.

Defendants claim that they are immune from suit under 42Pa.C.S. 8541 et seq. We agree with the defendants and are granting their demurrer making a decision on proper service and the filing of a proper complaint unnecessary.

The defense of immunity may be raised and decided on preliminary objections. Guinn v. Alburtis Fire Co.134 Pa. Cmwlth. 270, 577 A.2d 971 (1990) especially if that method is not objected to. Malia v. Monchak,supra, 543 A.2d at 187.

Since the Zoning Hearing Board and Township are local agencies enjoying governmental immunity (42Pa.C.S.A. 8541) and since the members of those boards enjoy official immunity (42 Pa.C.S.A. 8501, 8545) a suit may only be brought against them under certain circumstances. Suit may be brought against the local agency if it engaged in negligence[1] of the type outlined by the Political Subdivision Tort Claims Act (42Pa.C.S.A. 8542(b)) or against the individual members if they either engaged in similar acts of negligence (42Pa. C.S.A. 8545) or acted with actual malice, fraud or engaged in wilful misconduct. (42Pa. C.S.A. 8550[2].

Furthermore, immunity applies to any suit

involving injury whether physical or economic. E-Z Parks v. Philadelphia Parking Authority, 532 A.2d 1272 (1981) app.den. 519 Pa. 656, 546 A.2d 60.

The plaintiff has stated no cause of action against the Township or the Zoning Hearing Board as local agencies. He has not alleged any negligent acts that may impose liability (42Pa.C.S.A. 8542(b)) and he has no right to proceed against the local agencies for fraud, malice, or wilful misconduct. 42Pa.C.S.A. 8550 applies only to employees and not to local agencies. Steiner by Steiner v.City of Pittsburgh, 97Pa.Cmwlth. 440, 509 A.2d 1368 (1986); King V. Breach, 115 Pa. Cmwlth. 355, 540 A.2d 976 (1988).

As clearly, he has not stated a cause of action against the individual board members on account of negligence of the type for which liability may be imposed (42 Pa.C.S.A. 8542(b)). There are no allegations with respect to vehicle liability, care and control

of real property, trees, traffic controls, street lighting, utility services, streets, sidewalk or animals.

The only way he may avoid the demurrer as to the individual members of the Board is if he has properly pled that they acted within their scope of duties and engaged in actual malice, fraud or wilful misconduct so as to remove the cloak of official immunity and the defenses available to officials (42 Pa.C.S.A.. 8545, 8550,and 8546). Has he done that?

Although he has not said it in clear terms he has generally alleged that they acted within the scope of their offices or duties.

Beyond that the plaintiff has alleged that the individual members failed to accept his arguments and failed to apply the law he gave them. Even if true those actions do not constitute, nor has he properly pled facts which constitute fraud, malice or wilful misconduct.

Actual fraud has five elements that were outlined and discussed in a similar case by

the Commonwealth Court. Kuehner v. Parsons, 107 Pa. Cmwlth. 61, 527 A.2d 627 (1987) alloc. den., 538 A.2d 879 (1988). "Bald allegations ... without more, are insufficient to create an issue of material fact..." Kuehner v.Parsons, super. 527 A.2d at 629.

Furthermore, the plaintiff does not allege any facts that would amount to malice. Malice is generally understood as intentionally doing a wrongful act without lawful or justifiable excuse. The plaintiff suggests that the individual board members ignored the law and they disagreed with him but he does not allege any facts that indicate that they did so intentionally, knowing it was wrong and without reason or excuse.

The plaintiff alleges that the individual board members engaged in wilful misconduct but he has failed to allege any specific facts other than the bald conclusions.

Our appellate courts have dealt with a number of cases where ,local agencies, or their

individual board members, have made decisions even wrong decisions, and yet they were immune suit for damages.

In Swartz v. Masloff,62Pa. Cmwlth. 522, 437 A.2d 472 (1981) it was alleged that in condemning the appellant's property, city council members used a feasibility study that was not appropriate, did not engage in a total review of the entire project and did not have appropriate real estate appraisals performed.

In Leggieri v. Township of Haperford 108 Pa. Cmwlth. 646, 511 A.2d 955 (1986) a local agency was immune from liability for alleged trespasses in approving a developer's subdivision plan which permitted or caused water to flow from that land onto adjoining property.

In Schreck v. North Codorus Township 126 Pa. Cmwlth. 407, 559 A.2d 1018 (1989) alloc. granted 575 A.2d 5 (1990), appeal dismissed as improvidently granted, 79 M.D. 1990 (Fe.1991)

the local agency was immune from alleged improper issuance of a zoning permit and improper design of a sewage disposal system.

Mere conclusions are not enough without the pleadings of proper underlying facts. Malia v. Monchak, 116 Pa. Cmwlth. 484, 543 A.2d 184 (1988). The plaintiff, who has now had two opportunities to plead and who has filed three documents that we have considered in total, has not properly pled a cause of action against the defendants.

We will now grant the demurrer and dismiss his latest contempt.

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[1] An initial inquiry should be made to determine if damages would be recovered under common law. We take no position on that now for we decide this case on the immunity provisions.

[2] The members of the Zoning Hearing Board would not be protected by the policy making discretion defense (42 Pa.C.S.A. 8546(3)) because in applying the zoning ordinance they would not be acting in a discretionary manner but in a quasi judicial manner. Township of

Bensalem v. Press, 93 Pa. Cmwlth. 235, 501 A.2d 331, 336 (1985) which was decided under different law but the principles remain the same.

ORDER

AND NOW, August 28, 1992, the defendants' demurrer is granted, the plaintiff's complaint dismissed and this action dismissed.

BY ORDER OF COURT

/s/ Gordon R.Miller
P.J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JAMES H. ANDERS,
Appellant

v. :

WEST MEAD TOWNSHIP ZONING HEARING BOARD & Members TERRILL AIUPPY, MICHAEL L. JORDAN, MARK B. ZIMMERMAN and WEST MEAD TOWNSHIP BOARD OF SUPERVISORS, Members DANIEL MINICK, LORRANCE WASSON, JOSEPH JORDAN : No.2074 C.D. 1992 Submitted: January 29. 1993

BEFORE: HONORABLE JAMES GARDNER COLINS, Judge

HONORABLE DAN PELLEGRINI, Judge

HONORABLE SILVESTRI SILVESTRI, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE SILVESTRI FILED: May 27, 1993

James H. Anders (Anders) appeals from the order of the Court of Common Pleas of Crawford County (trial court) which granted the West Mead Township Zoning Board (Board) and the West Mead Township Board of Supervisors (Supervisors)[1] preliminary objection in the nature of a demurrer to a complaint filed by

Anders.

Before directly addressing the matters before us herein, we will set forth a history of the proceedings leading to this appeal.

Anders owned a single story residential dwelling in West Mead Township. In 1985 the Township's Zoning Ordinance (Ordinance) was amended, changing the district where Anders' property was located from residential to general industrial. Anders' property became a non-conforming use. In July of 1988. Anders applied for building and zoning permits to allow for expansion of his property by one and one half stories. Said permits were denied based upon a provision in the Township's Ordinance which limited expansion of a non-conforming use to fifty percent of the building area at the time the Ordinance was enacted. Any increase beyond fifty percent required a special exception.[2] Anders appealed this denial to the Board and additionally requested a variance from the Ordinance. Anders argued

that the fifty percent "building area" expansion limitation in the Ordinance applied to the area of ground covered by the nonconforming structure, but did not apply to an upward expansion. The Board rejected Anders' argument and upheld the permit denials and further denied Anders' variance request. Anders unsucessfully appealed the Board's decision to the trial court and to this Court.

In September of 1990, Anders applied for a special exception before the Board in order to pursue the expansion of his property sought earlier through his permit application and variance request. Thereafter, on December 13, 1990, Anders filed an application with the Board of Supervisors for a curative amendment in order to add to the Ordinance a definition of the term "building area". Anders proposed that the definition include only the ground area of a structure and not upward expansion.[3]

The Board denied Anders' request for a special exception. Anders then appealed this determination to the trial court and the court

sustained the appeal. The Board did not appeal the trial court's decision. The Board of supervisors, contrary to the Planning Comission's recommendation, rejected Anders' request for a curative amendment. The Board of Supervisors determined that although the Ordinance did not specifically define "building area", the plain language of the Ordinance, as well as the Township's intent was to include upward expansions within the meaning of the term "building area". The Board affirmed this decision. Anders appealed to the trial court which dismissed his appeal and no further appeal was taken in the matter.

On August 5, 1991, Anders instituted this action by filing a complaint with the trial court entitled "Suit to Recover Damages for the Incompetent Determinations of the West Mead Township's Board of Supervisors and Zoning Hearing Board Denying Lawful Expansion." (R.59). Anders asserted that the Board's denial of his request for a special exception and

the Board of Supervisors' rejection of his proposed curative amendment was improper. Anders averred that both Boards ignored legal authority cited by him. He asserted that a "determination ... that building area is related to height is imcompetent". (R.62). Anders requested relief in the form of money damages.

Preliminary objections were collectively filed on August 26, 1991 by all the named defendants. On March 13, 1992, the trial court filed an opinion and order wherein the defendants' preliminary objection in the nature of a demurrer was sustained on the basis of governmental immunity. The trial court permitted Anders to file an amended complaint within twenty days of the order. Anders filed a document entitled "Amendment to Complaint to include Fraud as well as Incompetence." (R.70). In this document Anders basically reiterated the averments contained in his original complaint. The trial court issued an opinion

and order on August 28, 1992; again sustaining the defendants' demurrer on the basis of immunity and dismissing Anders' action. This appeal followed.

Anders argues that the trial court erred in determining that the defendants were immune from suit.. Anders maintains that the conduct of the Board, the Board of Supervisors and their individual members, in rejecting his request for a curative amendment and special exception was wilful, fraudulent, malicious and without reason.

Our scope of review of a trial court decision is limited to determining whether the court abused its discretion, committed errors of law or violated constitutional rights. Appeal of Edge, 147 Pa. Commonwealth Ct. 27, 606 A.2d 1243 (1992).

As noted above, the trial court granted the demurrer based upon its conclusion that all the defendants were immune from the action asserted by Anders. The trial court pro-

perly noted that both the Board and the Board of Supervisors were immune from suit as local agencies in accordance with 42 Pa.C.S. §8541, and that Anders failed to plead facts which would fall within the immunity waivers enumerated at 42 Pa.C.S. §8542.[4] Further, the trial court properly concluded that the Board and the Board of Supervisors could not be subject to suit for willful, fraudulent or malicious conduct under 42Pa.C.S. §8550.[5] The trial court pointed out that the individual members of the Boards could be subject to suit under 42Pa.C.S. §8550 if it was demonstrated that they acted fraudulently, maliciously or willfully. However, the trial court, after examining Anders' original complaint and amended complaint, determined that Anders' merely asserted improper conduct based upon the individual Board members' disagreement with his arguments. The trial court, therefore, concluded that Anders failed to plead facts, which if proven, would indicate any fraudulent malicious or willful misconduct on the part of

the individual members of either Board.

Our independent review of the record reveals that the trial court did not commit any errors of law, abuse its discretion, or violate constitutional rights in making its determination. Accordingly, we will affirm its decision.

SILVESTRI SILVESTRI, Senior
Judge

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[1]In addition to naming the Board and the Board of Supervisors as defendants in his Complaint, Anders named Terrill Aiuppy, Michael L. Jordan and Mark B. Zimmerman, individual members of the Board, and Daniel Minick, Lorrance Wasson, and Joseph Jordan, individual members of the Board of Supervisors, as indicated in the caption of this case.

[2]Section 805.2 of the Ordinance provides:
A nonconforming use of a whole building may be enlarged or extended to occupy additional building area which is greater by 50% than the area occupied at the effective date of adoption of this ordinance or an amendment thereto, providing such enlargement or ex tension is permitted as a special exception

by the Zoning Hearing Board.

[3]Anders' proposed definition for "building area" was as follows:
The total of areas taken on a horizontal plane at the main grade level of the principal building and all accessory buildings, exclusive of uncovered porches, terraces and steps.

[4]Section 8542, entitled "Exceptions to Governmental Immunity" sets forth specific instances in which governmental immunity has been waived. None of the exceptions apply here.

[5]42 Pa.C.S. §8550 entitled "willful misconduct" provides as follows:

In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of sections 8545 (relating to defense of official immunity), 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply. (Emphasis added).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JAMES H.ANDERS,
Appellant

v

WEST MEAD TOWNSHIP ZONING HEARING BOARD & Members TERRILL AIUPPY, MICHAEL L. JORDAN, MARK B. ZIMMERMAN and WEST MEAD TOWNSHIP BOARD OF SUPERVISORS, Members DANIEL MINICK, LORRANCE WASSON, JOSEPH JORDAN : No. 2074 C.D. 1992

ORDER

AND NOW this 27th day of May, 1993, the order of the Court of Common Pleas of Crawford County dated August 28, 1992 is affirmed.

SILVESTRI SILVESTRI, Senior Judge

THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

Mr. James Anders
Springs Road R.D,7
Meadville, Pa., 16335

In Re: James H. Anders, Petitioner v. Zoning Hearing Board of West Mead Township Board of Supervisors et al. v. West Mead Township Board of Supervisors, Daniel Minick, Lorance Wasson, Joseph Jordan, Members
No. 0353 W.D. Allocatur Docket 1993

Dear Mr. Anders:

The Court has entered the following Order on your Petition for Allowance of Appeal filed in the above captioned matter:

"PER CURIAM:

AND NOW, this 1st day of June, 1994, the Petition for Allowance of Appeal is hereby denied.

Mr. Justice Frank J. Montemuro is sitting by designation as Senior Justice pursuant to Judicial Assignment Docket No. 94 R1800, due to the unavailability of Mr. Justice Rolf Larsen, see No. 127 Judicial Administration Docket No. 1, filed October 28, 1993."

very truly yours,

CHIEF CLERK

cc: Alan Shaddinger, Esquire
Hon. Gordon R. Miller,P.J.